

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF NEVADA

3 * * *

4 SCOTT MICHAEL WHITT,
5 Plaintiff,

6 v.

7 RICHLAND HOLDINGS, INC. d/b/a
8 ACCTCORP OF SOUTHERN NEVADA, A
9 NEVADA CORPORATION; RC WILLEY
FINANCIAL SERVICES; and ATTORNEY
JEROME R. BOWEN, ESQ.,

10 Defendants.
11

Case No. 2:17-cv-00014-APG-NJK

**ORDER GRANTING DEFENDANT RC
WILLEY'S MOTION TO DISMISS
AND DENYING PLAINTIFF'S
MOTION FOR LEAVE TO AMEND**

(ECF Nos. 10, 13)

12 Scott Whitt sues defendants Richland Holdings, Inc d/b/a ACCTCORP of Southern
13 Nevada (AcctCorp), RC Willey Financial Services (RCW), and attorney Jerome R. Brown for
14 alleged actions arising from the collection of a debt. Whitt claims that all defendants are liable
15 for violations of the Fair Debt Collection Practices Act (FDCPA) and Nevada Revised Statutes
16 Chapter 598 (regarding deceptive trade practices), as well as for abuse of process and civil
17 conspiracy.

18 RCW moves to dismiss the complaint in its entirety or, in the alternative, for a more
19 definite statement as to Whitt's deceptive trade practices (DTP) claim. Whitt seeks leave to
20 amend his complaint to correct the deficiencies discussed in RCW's motion. I dismiss with
21 prejudice Whitt's FDCPA and abuse of process claims, and I dismiss the DTP and civil
22 conspiracy claims, but with leave to amend. Whitt's motion for leave to amend is moot.

23 **I. BACKGROUND¹**

24 In 2011, Whitt entered into a contract with RCW for a line of credit to purchase home
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27 ¹ These facts are taken from Whitt's complaint and the underlying state court docket, and
28 what I accept as true at the motion to dismiss stage. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678
(2009). I may take judicial notice of the fact that documents were filed in state court proceedings,

1 furnishings and related goods.² Whitt eventually became delinquent in his payments and had an
2 account balance of \$7,850.95.³ RCW assigned the debt to AcctCorp for collection.⁴ On August
3 19, 2014, AcctCorp filed a lawsuit in state court to collect the debt.⁵ The complaint demanded
4 payment of “the total sum of \$11,776.43, including Contractual Collection Fees, plus Contractual
5 Interest at the rate of 24.00%, from Date of First Delinquency, which is an amount equal to
6 \$123.89, plus Costs”⁶ Default was entered on June 9, 2015.⁷ AcctCorp then filed an
7 application for default judgment, and later filed a “Prove Up Request.”⁸

8 Two documents attached to the prove-up request contain the crux of Whitt’s allegations
9 against RCW. The first, titled “Confidential Legal Authorization,” purportedly authorized
10 AcctCorp to file suit against Whitt, and was signed by an unidentified person.⁹ That document
11 listed the “balance assigned” to AcctCorp as \$7,850.95.¹⁰ The second document is titled
12 “Affidavit/Declaration of Custodian of Records.”¹¹ There, Melissa Anderson, identified as
13 RCW’s custodian of records, states that Whitt “became delinquent on 2/14/2014 with an account
14 balance of \$7,850.95. A contractual collection fee of \$3,925.48 was added for a total of
15 \$11,776.43.¹² The affidavit was not notarized. Rather, Anderson signed the portion of the
16 affidavit stating: “If executed outside this state (Nevada): ‘I declare under penalty of perjury
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18 but I do not take judicial notice of the truth of the matters stated within those filings. *Lee v. City*
19 *of L.A.*, 250 F.3d 668, 690 (9th Cir. 2001).

20 ² ECF No. 1 at 2; ECF No. 12-2 at 8 (credit application).

21 ³ ECF No. 1 at 2-3.

22 ⁴ *Id.* at 2.

23 ⁵ ECF No. 12-1 (state court complaint).

24 ⁶ *Id.* at 3.

25 ⁷ ECF No. 12-2 at 33.

26 ⁸ ECF No. 16-2 at 3 (revised proposed amended complaint).

27 ⁹ *Id.*

28 ¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

1 under the State of Nevada that the foregoing is true and correct.”¹³ The state court granted
2 AcctCorp’s application and entered default judgment.¹⁴

3 Whitt initiated this action in January 2017. All of his claims against RCW stem from the
4 following factual assertions. RCW’s contract with Whitt is governed by Utah law.¹⁵ Utah law
5 prohibits contractual collection fees for more than 40% of the principal balance of a debt.¹⁶ The
6 collection fee collected here is approximately 50% of the principal balance, and thus violates
7 Utah law.¹⁷ Therefore, Whitt alleges that RCW and the other defendants (1) violated the FDCPA
8 because they used “‘unfair and unconscionable means’ to collect the debt” by violating Utah law;
9 (2) “commenced and/or prosecuted legal proceedings against [Whitt] for the ulterior purpose of
10 collecting unlawful rates of interest and unlawful fees in violation of the FDCPA”; (3) “engaged
11 in unfair and deceptive acts or practices in the conduct of its commerce and trade through its
12 unfair and deceptive debt collection and litigation activities in violation of NRS Chapter 58”; and
13 (4) engaged in civil conspiracy by undertaking “a concerted action with the intent to” violate Utah
14 law.¹⁸

15 RCW moves to dismiss, arguing that (1) FDCPA claims cannot be brought against an
16 original creditor; (2) all of the claims are barred under the FDCPA’s one-year statute of
17 limitations; (3) AcctCorp, not RCW, brought legal action against Whitt, and the only involvement
18 RCW had in the case was providing an affidavit stating the debt amount, which was done in the
19 regular course of the judicial proceeding; (4) Whitt’s citation in his complaint to the entirety of
20 NRS Chapter 58 is so vague and ambiguous that RCW cannot reasonably prepare a response; and
21 (5) the civil conspiracy claim fails because all of Whitt’s other claims fail.¹⁹

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23 ¹³ ECF No. 12-2 at 31 (Affidavit/Declaration).

24 ¹⁴ ECF No. 12-3.

25 ¹⁵ ECF No. 1 at 2.

26 ¹⁶ *Id.* at 3.

27 ¹⁷ *Id.*

28 ¹⁸ ECF No. 1 at 4-7.

¹⁹ ECF No. 10.

1 Whitt seeks leave to amend his complaint to cure the defects pointed out in RCW's
2 motion.²⁰ The proposed amended complaint, however, does not provide any further detail
3 regarding which Nevada statutory claims he intended to assert.²¹ In his reply, Whitt attaches a
4 revised amended complaint including some specific provisions of the statute he alleges the
5 defendants violated.²²

6 **II. DISCUSSION**

7 **A. Legal Standards**

8 **1. Motion to Dismiss**

9 A properly pleaded complaint must provide a "short and plain statement of the claim
10 showing that the pleader is entitled to relief."²³ While Rule 8 does not require detailed factual
11 allegations, it demands more than "labels and conclusions" or a "formulaic recitation of the
12 elements of a cause of action."²⁴ "Factual allegations must be enough to rise above the
13 speculative level."²⁵ To survive a motion to dismiss, a complaint must "contain[] enough facts to
14 state a claim to relief that is plausible on its face."²⁶

15 District courts must apply a two-step approach when considering motions to dismiss.²⁷
16 First, the court must accept as true all well-pleaded factual allegations and draw all reasonable
17 inferences from the complaint in the plaintiff's favor.²⁸ Legal conclusions, however, are not
18 entitled to the same assumption of truth even if cast in the form of factual allegations.²⁹ Mere
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20 ²⁰ ECF No. 13.

21 ²¹ See ECF No. 13-1 at 8-9.

22 ²² ECF No. 16-2.

23 ²³ FED. R. CIV. P. 8(a)(2); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

24 ²⁴ *Iqbal*, 556 U.S. at 678 (2009).

25 ²⁵ *Twombly*, 550 U.S. at 555.

26 ²⁶ *Iqbal*, 556 U.S. at 696 (internal quotation marks and citation omitted).

27 ²⁷ *Id.* at 679.

28 ²⁸ *Id.*; *Brown v. Elec. Arts, Inc.*, 724 F.3d 1235, 1247–48 (9th Cir. 2013).

29 ²⁹ *Iqbal*, 556 U.S. at 679; *Brown*, 724 F.3d at 1248.

1 recitals of the elements of a cause of action, supported only by conclusory statements, do not
2 suffice.³⁰ Second, the court must consider whether the factual allegations in the complaint allege
3 a plausible claim for relief.³¹ A claim is facially plausible when the complaint alleges facts that
4 allow the court to draw a reasonable inference that the defendant is liable for the alleged
5 misconduct.³² Where the complaint does not permit the court to infer more than the mere
6 possibility of misconduct, the complaint has “alleged—but it has not shown—that the pleader is
7 entitled to relief.”³³ When the claims have not crossed the line from conceivable to plausible, the
8 complaint must be dismissed.³⁴ “Determining whether a complaint states a plausible claim for
9 relief will . . . be a context-specific task that requires the [district] court to draw on its judicial
10 experience and common sense.”³⁵

11 **2. Motion for Leave to Amend**

12 Federal Rule of Civil Procedure 15(a)(2) provides that “a party may amend its pleading
13 only with the opposing party’s written consent or the court’s leave. The court should freely give
14 leave when justice so requires.” My discretion to grant leave to amend is guided by various
15 factors, including “bad faith, undue delay, prejudice to the opposing party, and whether the
16 plaintiff has previously amended the complaint.”³⁶ I apply Rule 15’s policy favoring
17 amendments with “extreme liberality.”³⁷

18 **B. FDCPA**

19 The FDCPA distinguishes between creditors and debt collectors. “Debt collector” refers
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21 ³⁰ *Iqbal*, 556 U.S. at 678.

22 ³¹ *Id.* at 679.

23 ³² *Id.* at 663.

24 ³³ *Id.* at 679 (internal quotation marks and citation omitted).

25 ³⁴ *Twombly*, 550 U.S. at 570.

26 ³⁵ *Iqbal*, 556 U.S. at 679.

27 ³⁶ *Ecological Rights Found. v. Pac. Gas & Elec. Co.*, 713 F.3d 502, 520 (9th Cir. 2013)
(internal quotation marks and citation omitted).

28 ³⁷ *U.S. v. Webb*, 655 F.2d 977, 979 (9th Cir. 1981).

1 to “any person who uses any instrumentality of interstate commerce ... in any business the
2 principal purpose of which is the collection of any debts, or who regularly collects or attempts to
3 collect, directly or indirectly, debts owed or due or asserted to be owed or due another.”³⁸ A
4 “creditor” is “any person who offers or extends credit creating a debt or to whom a debt is owed,
5 but such term does not include any person to the extent that he receives an assignment or transfer
6 of debt in default solely for the purpose of facilitating collection of such debt for another.”³⁹ By
7 the express terms of the statute, a creditor collecting its own debt is not a debt collector.

8 Whitt admits that RCW is a creditor to which the FDCPA does not apply.⁴⁰ I therefore
9 grant RCW’s motion to dismiss the FDCPA claim against RCW.

10 **C. State law claims and FDCPA’s statute of limitations**

11 RCW argues that all of Whitt’s remaining state law claims are predicated on violations of
12 the FDCPA, and therefore must also be dismissed because (1) Whitt does not state a claim against
13 RCW under the FDCPA, and (2) the FDCPA’s one-year statute of limitations bars those claims.⁴¹

14 RCW provides no relevant support for the argument that, because the FDCPA claim must
15 be dismissed, all other claims based on the same alleged conduct must also be dismissed. I have
16 dismissed the FDCPA claim against RCW solely because the FDCPA’s express statutory
17 language does not apply to original creditors. That does not mean that no state law claim based
18 on similar conduct cannot be brought against RCW. The FDCPA does not preempt state laws
19 regarding debt collection practices, “except to the extent that those laws are inconsistent” with the
20 FDCPA “and then only to the extent of the inconsistency.”⁴² “Although states may enact greater
21 protections than the FDCPA, not every violation of state law amounts to an FDCPA violation.”⁴³

22 ³⁸ 15 U.S.C. § 1692a(6).

23 ³⁹ *Id.* § 1692a(4).

24 ⁴⁰ ECF No. 1 at 2, ¶ 6; ECF No. 12 at 7, ¶ 10-12 (“Plaintiff does not dispute that his
25 FDCPA claim does not apply to RC Willey since RC Willey is the original creditor.”)

26 ⁴¹ ECF No. 10 at 5-8.

27 ⁴² 15 U.S.C. § 1692n.

28 ⁴³ *Preston v. Clark County Collection Serv., LLC*, 2:15-cv-00021-APG-PAL, 2014 WL
6882626, at *4 (D. Nev. Dec. 4, 2011) (citing *Wade v. Regional Credit Ass’n*, 87 F.3d 1098, 1100

1 Whitt could allege facts indicating that the same unlawful conduct may violate state law but
2 would not violate the FDCPA.

3 Similarly, RCW's argument that the FDCPA's statute of limitations applies to Whitt's
4 state law claims is unavailing. RCW points to no authority allowing the application of a federal
5 statute of limitations to state law prohibiting similar conduct. In the absence of any such
6 authority, I decline to apply the FDCPA's statute of limitations to Whitt's state law claims.

7 **D. Abuse of Process**

8 To successfully allege a tort claim for abuse of process under Nevada law, a plaintiff must
9 establish two elements: (1) the defendant had an ulterior purpose in the underlying lawsuit other
10 than resolving a legal dispute, and (2) the defendant willfully and improperly used the legal
11 process to accomplish that purpose.⁴⁴ "Thus, the [plaintiff] must provide facts, rather than
12 conjecture, showing that the party intended to use the legal process to further an ulterior
13 purpose."⁴⁵ An action for abuse of process hinges on misuse of regularly issued process, in
14 contrast to malicious prosecution, which rests upon wrongful issue of process.⁴⁶ The mere filing
15 of a complaint with malicious intent is insufficient to state an abuse of process claim; there must
16 also be some act subsequent to filing that abuses the process.⁴⁷

17 The Supreme Court of Nevada has found improper willful acts where a defendant
18 commits a flagrant or extraordinary act that perverts the legal process. For example, in *Nevada*
19 *Credit Rating Bureau v. Williams*, the Court affirmed a finding of abuse of process where a
20 plaintiff attached an entire property worth over \$30,000 to secure a debt of less than \$5,000 with
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23 (9th Cir. 1996) ("We disagree with Wade that debt collection practices in violation of state law
24 are per se violations of the FDCPA.")).

25 ⁴⁴ *LaMantia v. Redisi*, 38 P.3d 877, 880 (Nev. 2002).

26 ⁴⁵ *Land Baron Inv. v. Bonnie Springs Family LP*, 356 P.3d 511, 519 (Nev. 2015).

27 ⁴⁶ *Dutt v. Kremp*, 844 P.2d 786, 790 (Nev. 1992) (internal citations omitted), *overruled on*
28 *other grounds by LaMantia v. Redisi*, 38 F.3d 877 (Nev. 2002).

⁴⁷ *Laxalt v. McClatchy*, 622 F. Supp. 737, 752 (D. Nev. 1985).

1 the ulterior purpose to coerce payment rather than to obtain security for the debt.⁴⁸ Similarly, the
2 Court found abuse of process when a city attorney charged a police officer with a criminal
3 violation in order to obtain the officer's voluntary resignation.⁴⁹ Coercing a nuisance settlement
4 where there was no legal basis for a claim was also an abuse of process.⁵⁰

5 Whitt's complaint and proposed amended complaint allege the defendants "commenced
6 and/or prosecuted legal proceedings against Plaintiff for the ulterior purpose of collecting
7 unlawful rates of interest and unlawful fees in violation of the FDCPA."⁵¹ However, Whitt
8 acknowledges that RCW did not file the state action or prosecute the case.⁵² Instead, Whitt
9 claims that RCW "actively participated in the abuse of process by providing inconsistent and
10 inadmissible evidence regarding the amount assigned to [AcctCorp], by agreeing to charge [a]
11 collection fee of 50% in violation of Utah law and its contract with Plaintiff."⁵³ He argues that
12 the Affidavit/Declaration and the Confidential Legal Authorization form supplied by RCW are
13 inconsistent because only the Affidavit/Declaration reflects the allegedly unlawful contractual
14 collection fee. He also claims that the Affidavit/Declaration's technical flaws⁵⁴ indicate that the
15 documents were "not reviewed carefully by affiants and notarization was done in a manner that
16 flaunted state law regarding notaries public."⁵⁵

17 Whitt's contentions do not state a claim for abuse of process against RCW because Whitt
18 does not allege that RCW actually used the legal process. Rather, Whitt argues that RCW abused
19 the court process by providing AcctCorp with an affidavit (which *AcctCorp* subsequently filed in
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21 ⁴⁸ 503 P.2d 9, 12-13 (Nev. 1972).

22 ⁴⁹ *Pasadas v. City of Reno*, 851 P.2d 438, 445 (Nev. 1993).

23 ⁵⁰ *Bull v. McCuskey*, 615 P.2d 957, 960 (Nev. 1980).

24 ⁵¹ ECF No. 1 at 5; ECF No. 13-1 at 7.

25 ⁵² ECF No. 1 at 2-3; ECF No. 13-1 at 3.

26 ⁵³ ECF No. 12 at 7.

27 ⁵⁴ Whitt also takes issue with the fact that the heading of the affidavit mentions Clark
28 County, Nevada, while Anderson signed the document outside of Nevada. *See id.* at 4.

⁵⁵ *Id.* at 13 (citing *Brannan v. Wells Fargo Home Mortg., Inc.*, 485 B.R. 443, 450 (Bankr. S.D. Ala. 2013)).

1 the state action) that listed an unlawful collection fee and was not properly notarized. It is not
2 alleged that RCW filed the affidavit itself or was otherwise actively involved in the state court
3 action. Simply stated, RCW did not use the legal system; AcctCorp did. Because RCW cannot
4 reasonably be said to have used the legal system to collect this debt, I dismiss this claim against
5 RCW with prejudice.

6 **E. Deceptive Trade Practices⁵⁶**

7 Whitt's complaint alleges that all defendants "engaged in unfair and deceptive acts or
8 practices in the conduct of its (sic) commerce or trade through its (sic) unfair and deceptive debt
9 collection and litigation activities in violation of NRS Chapter 598."⁵⁷ Chapter 598 contains ten
10 sections, each which defines a separate set of deceptive trade practices.⁵⁸ Each of those sections
11 further enumerates categories of conduct, some identifying as many as 16 sub-categories of
12 violating conduct.⁵⁹ RCW argues that it "cannot be expect to guess regarding on which of these
13 nearly one hundred (100) possible categories of conduct [Whitt] is basing his claims."⁶⁰ RCW
14 asks that Whitt provide "a more definite statement setting forth (1) under what category of DTP
15 [Whitt] brings the claim and (2) what facts support such claims."⁶¹

16 Although Whitt did not object to RCW's motion for a more definite statement on his DTP
17 claim and promised to provide more specifics, Whitt's proposed amended complaint fails to
18 contain any additional information.⁶² In his reply, Whitt claims he attached the wrong document
19 to his motion for leave to amend, and attached the "corrected" one as an exhibit to his reply.⁶³ In
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21 ⁵⁶ Because I denied RCW's request to dismiss this claim, *see* Section II.C, *supra*, I address
22 only RCW's motion for a more definite statement as to this claim.

23 ⁵⁷ ECF No. 1 at 6.

24 ⁵⁸ *See generally*, Nev. Rev. Stat. §§ 598.015, 598.016, 598.017, 598.018, 598.092,
25 598.0921, 598.0922, 598.0923, 598.0924, and 598.0925.

26 ⁵⁹ *See id.*

27 ⁶⁰ ECF No. 10 at 9.

28 ⁶¹ *Id.* at 10.

⁶² *See* ECF No. 13-1 at 7-8.

⁶³ ECF No. 16 at 2 n.1; ECF No. 16-2.

1 that version of his amended complaint, he includes three specific sections he alleges the
2 defendants violated.⁶⁴ The “factual allegations” portion of the amended complaint was also
3 expanded to include additional facts specific to Whitt’s allegations against RCW.⁶⁵

4 The proposed amended complaint attached to Whitt’s reply was improperly filed and I
5 will not consider it. However, because Whitt has shown that he may be able to amend his
6 complaint to state a DTP claim, I grant Whitt leave to file an amended complaint addressing the
7 deficiencies discussed above, including with the DTP claims. I deny Whitt’s current motion for
8 leave to amend as moot.

9 **F. Civil Conspiracy**

10 RCW argues that Whitt’s civil conspiracy claim fails because all of his other claims fail.⁶⁶
11 Because I grant Whitt leave to file an amended complaint as to his DTP claims, that argument is
12 unpersuasive. However, Whitt’s civil conspiracy claim contains only conclusory statements and
13 formulaic recitations of the elements of civil conspiracy.⁶⁷ It merely states that “the defendants
14 undertook a concerted action with the intent to commit the Collection Fee Violations, the
15 [FDCPA] Violations, and the Interest Fees Violations.”⁶⁸ It is unclear which facts alleged in the
16 complaint support this claim. I dismiss Whitt’s civil conspiracy claim but grant him leave to
17 amend it if he can properly allege sufficient facts to support such a claim.

18 **III. CONCLUSION**

19 IT IS THEREFORE ORDERED that Defendant RCW’s motion to dismiss (**ECF No. 10**)
20 **is GRANTED.** Whitt’s FDCPA and abuse of process claims against RCW are dismissed with
21 prejudice. Whitt’s DTP and civil conspiracy claims against RCW are dismissed with leave to
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24 ⁶⁴ ECF No. 16-2 at 7-8.

25 ⁶⁵ *See id.* at 2-6.

26 ⁶⁶ ECF No. 10 at 10.

27 ⁶⁷ *See Twombly*, 550 U.S. at 555; *Iqbal*, 556 U.S. at 678.

28 ⁶⁸ ECF No. 1 at 8.

1 amend. The plaintiff must file and serve an amended complaint consistent with this order **on or**
2 **before October 13, 2017.**

3 IT IS FURTHER ORDERED that Whitt's motion for leave to amend (ECF No. 13) is
4 **DENIED as moot.**

5 DATED this 26th day of September, 2017.

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9 ANDREW P. GORDON
10 UNITED STATES DISTRICT JUDGE
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